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No. 03-5554

IN THE

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

vs.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT, and the HONORABLE RICHARD A. WAGNER, District Judge,

Respondents.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does it violate the Fifth Amendment's self-incrimination privilege to require a suspect validly stopped under *Terry* v. *Ohio*, 392 U. S. 1 (1968) to provide identification at the request of the stopping officer?

2. Is this identification requirement an illegal seizure under the Fourth Amendment?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

This case addresses whether the Fourth and Fifth Amendments prevent the government from allowing police officers to demand identification from suspects validly stopped under *Terry* v. *Ohio*. *Terry* stops are intended to prevent or solve crimes through investigation that is less intrusive than a search or an arrest. Determining the identity of a suspect is essential to an effective *Terry* stop. Identity helps find the most culpable and allows for the early release of innocent suspects. Determining identity also allows police to release suspects while retaining the ability to contact them later. This important investigative tool is minimally intrusive and does not involve any compulsion of incriminating testimonial information. Upholding Nevada's stop and identify statute is vital to public safety and therefore serves the interests of victims of crime and law-abiding society that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On May 21, 2001, Humboldt County Sheriff's Deputy Lee Dove received a call from police dispatch that a concerned citizen saw someone hitting a female passenger in a truck. See *Hiibel* v. *Sixth Judicial District Court*, 59 P. 3d 1201, 1203 (Nev. 2002); J. A. 3. Deputy Dove responded to the call and spoke to the concerned citizen, who pointed out the truck. The deputy noticed skid marks in the gravel, suggesting that the truck had been parked suddenly and aggressively. See *ibid.* He saw the defendant, Larry D. Hiibel, standing outside the truck. Dove concluded that Hiibel "was intoxicated based on his eyes, mannerisms, speech, and odor." *Ibid.* Hiibel's daughter, a minor, was in the passenger seat of the truck.

Under Nevada law, a person stopped by a police officer under a reasonable suspicion standard "shall identify himself" to the officer. See *ibid.*; Nevada Revised Statutes ("NRS") 171.123. Dove asked Hiibel to identify himself but Hiibel refused and instead put "his hands behind his back and challenged the officer to take him to jail." 59 P. 3d, at 1203. Hiibel

refused to provide any identification, because he believed that he had done nothing wrong. See *ibid.* Hiibel was arrested after he declined 11 separate requests for identification. See *ibid.* He was next charged with resisting a public officer and convicted by the justice of the peace of that offense. See *ibid.*; NRS 199.280.

The Nevada District Court upheld Hiibel's conviction on appeal, finding that NRS 171.123 did not violate the Fifth Amendment. See 59 P. 3d, at 1203-1204. The conviction was affirmed by the Nevada Supreme Court. It held that NRS 171.123 "does not violate the Fourth Amendment because it strikes a balance between constitutional protections of privacy and the need to protect police officers and the public." *Id.*, at 1203. Balancing the public interest in requiring suspicious individuals to identify themselves to the police with an individual's privacy interests, the court found that the obligation to identify imposed by NRS 171.123 was reasonable. See *id.*, at 1205. This "common sense" requirement was "good law consistent with the Fourth Amendment." *Id.*, at 1207. This Court granted certiorari on October 20, 2003.

SUMMARY OF ARGUMENT

This case is an appropriate vehicle for determining whether the government may require a person validly stopped under *Terry* v. *Ohio*, 392 U. S. 1 (1968) to provide identification to the investigating officer. *Brown* v. *Texas*, 443 U. S. 47 (1979) does not control because the stop in this case was supported by reasonable suspicion. *Kolender* v. *Lawson*, 461 U. S. 352 (1983) is not relevant because the petitioner does not make a vagueness challenge.

The identification requirement does not violate the Fifth Amendment's self-incrimination privilege. The self-incrimination privilege only applies to compelled statements which are incriminating and testimonial. Identification is not incriminating in the context of a *Terry* stop. Identification can be

incriminating when a person is required to identify oneself with some criminal matter such as membership in an illegal organization or participation in an illegal activity. Identity at a *Terry* stop does not do this. While identity will aid the investigation, it does not by itself incriminate the suspect.

Fourth Amendment analysis of the Nevada statute first focuses on the relevant privacy interests. The demands of modern society minimize an individual's interest in the privacy of his or her identity. Establishing and maintaining proof of identity is essential for anyone to participate in modern society in any meaningful way. Employment, government benefits, driving, and credit are only some of the activities that require identification. When something is repeatedly exposed to the public, any reasonable expectation of privacy rapidly diminishes. Nevada knew who petitioner was, and his privacy interest in remaining anonymous to Deputy Dove was minimal. Although not dispositive, the lack of anonymity with respect to the government is telling.

While there is little privacy interest in identity, the act of requiring someone to comply with an identification request is a seizure. The seizure is minimal, however, because compliance is easy and routine for most individuals. Most people carry some form of identification with them when in public. Since the act of producing identification for someone is simple and routine for most, Nevada's identification requirement does not burden an individual to any constitutionally significant degree. *Terry* stops are meant to investigate, and the minimally intrusive request for identification is a natural part of this investigation.

An identification requirement neither threatens individuals with arrests at an officer's discretion, nor subverts the probable cause standard. Stop and identify statutes do not threaten individuals with arbitrary arrest, because *Brown* v. *Texas* requires that the initial stop must be based upon reasonable suspicion before an identification statute can apply. Although less rigorous than probable cause, reasonable suspicion is still

an objective standard that requires an officer to justify the temporary seizure with articulable facts. This prevents random stops and thus controls officer discretion. The probable cause standard is not threatened because arrests are only authorized when the identification statute is violated. If an officer does not have probable cause to suspect that the detained individual violated the identification requirement, then there can be no arrest. The petitioner's assertions to the contrary reflect hyperbole and dissatisfaction with this Court's Fourth Amendment jurisprudence.

Because Nevada's identification requirement is reasonable, it complies with the Fourth Amendment. While history is often crucial to Fourth Amendment analysis, it is inapplicable here because the pervasive use of identification did not exist at the common law. Where history is not relevant, then the constitutionality of an intrusion is determined by balancing government and individual interests to determine whether the intrusion is reasonable.

Requiring *Terry* detainees to identify themselves is reasonable. Finding the suspect's identification is essential to an effective *Terry* stop. It allows police to more readily find dangerous individuals, such as fugitives or those with outstanding warrants. It can also lead to the quick release of the innocent when the police are looking for a particular individual or class of criminals. In more ambiguous cases, it allows the officer to release the suspect with the prospect of being able to contact him or her in the future for more investigation. When balanced against its minimal privacy costs, the Nevada identification requirement is reasonable and therefore constitutional.

ARGUMENT

On two separate occasions, this Court has declined to address whether the government may require a person validly stopped under *Terry* v. *Ohio*, 392 U. S. 1 (1968) to provide identification to the investigating officer. In *Brown* v. *Texas*,

443 U. S. 47, 51-52 (1979), the stop was not supported by reasonable suspicion, so there was no reason to address this issue. In *Kolender* v. *Lawson*, 461 U. S. 352 (1983), the unconstitutional vagueness of the identification requirement foreclosed any further constitutional analysis. See *id.*, at 361-362, n. 10. These problems are absent in the present case. The citizen complaint and Deputy Dove's personal observations, see *supra*, at 2, readily support a reasonable suspicion that Hiibel had committed a battery against the girl and had been driving while intoxicated. There is also no claim properly before this Court that NRS 171.123 is unconstitutionally vague. This issue apparently was not raised before the Nevada Supreme Court. Its opinion "address[ed] the merits of Hiibel's constitutional challenge to NRS 171.123(3)." *Hiibel* v. *Sixth Judicial District Court*, 59 P. 3d 1201, 1204 (Nev. 2002). The opinion only addressed the contention that the statute violated the Fourth Amendment. See *id.*, at 1207. The petitioner addresses the vagueness issue in one sentence. "Moreover, although certainly a strong argument can be made that the Nevada statute is unconstitutionally vague, cf. *Kolender*, *supra*, at 361, it is Mr. Hiibel's contention that even if the statute could be rewritten in such a way that it would not be vague, it would nevertheless be unconstitutional as violative of the Fifth and Fourth Amendments." Pet. Brief 15. This is not a vagueness challenge. Any ambiguity in this statement is resolved in the next paragraph of his brief:

> "Mr. Hiibel is, however, asserting that although the police authorities have the right to ask questions, he is not required to answer those questions, in particular questions regarding his identity, and that his failure to do so should not result in criminal sanctions which can include arrest, a fine, and jail. For the reasons that follow, Nev. Rev. Stat. 171.123(3) is *violative of the Fifth and Fourth Amendments* to the United States Constitution." *Ibid.* (footnote omitted; emphasis added).

Issues not briefed before this Court should not be addressed by it. See *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 465, n. 5 (1989). Petitioner's effective abandonment of the vagueness challenge places the Fourth and Fifth Amendment issues squarely before this Court.

I. Requiring a *Terry* detainee to provide identification does not violate the Fifth Amendment's self-incrimination privilege.

The Fifth Amendment privilege against compelled self-incrimination has three conditions that must be met before it applies—compulsion, testimony, and incrimination. See *Baltimore City Dept. of Social Servs.* v. *Bouknight*, 493 U. S. 549, 554 (1990). While NRS 171.123 has the necessary compulsion, the threat of prosecution for resisting a public officer, see *supra*, at 2, its identification requirement lacks the incriminatory aspect needed to invoke the privilege.

California v. *Byers*, 402 U. S. 424 (1971) is the decision closest to the present case. *Byers* held that a California statute requiring the driver of an automobile in an accident to remain at the scene and provide one's name and address did not violate the Fifth Amendment. See *id.*, at 425, 427 (plurality); *id.*, at 458 (Harlan, J., concurring). The plurality opinion appropriately noted that giving out comparatively innocuous identifying information is both commonplace and necessary.

> "An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollut-

ants discharged into our waters and atmosphere. Comparable examples are legion." *Id.*, at 427-428.

Therefore, the mere possibility that the information provided may incriminate is insufficient to invoke the privilege. See *id.*, at 428. The risk of self-incrimination must be "'substantial'" before the privilege is applicable. See *id.*, at 429. For example, during prohibition a bootlegger could not claim a complete exemption from filing a federal income tax return simply because it increased his chance of being prosecuted and convicted by revealing the illegal source of his income. See *United States* v. *Sullivan*, 274 U. S. 259, 263-264 (1927).

The Fifth Amendment prohibits a much narrower, more focused, and more incriminating class of government compulsion. While filing an income tax return, or providing one's identification at an auto accident did not implicate the privilege, requiring members of the Communist Party to register with the Attorney General did. See *Albertson* v. *Subversive Activities Control Bd.*, 382 U. S. 70, 78 (1965). *Albertson* turned on the fact that "[t]he risks of incrimination which the petitioners take in registering are obvious." *Id.*, at 77. When *Albertson* was decided, membership in the Communist Party opened one to prosecution under several federal statutes. See *ibid.* Therefore, even "mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege." *Ibid.* The statute did not simply require Albertson to identify himself. Rather, it required him to step forward from the crowd and identify himself as a *Communist Party Member*. At the time, that was tantamount to confessing to a crime. The conclusion that a law requiring someone to give this information to the government violates the Fifth Amendment is simple common sense.

The *Byers* plurality used *Albertson* as a template for its incrimination analysis. Most important to this was a passage in *Albertson* distinguishing *Sullivan*.

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a *highly selective group inherently suspect of criminal activities*. Petitioners' claims are not asserted in an *essentially noncriminal* and *regulatory area* of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the . . . questions in context might involve the petitioners in the admission of a crucial element of a crime." *Byers*, 402 U. S., at 429 (quoting *Albertson*, 382 U. S., at 79) (emphasis added in *Byers*).

Since *Byers* involved a law designed primarily "to promote the satisfaction of civil liabilities arising from automobile accidents," *id.*, at 430, the plurality naturally emphasized the regulatory, noncriminal aspects of the California "hit and run" statute. This fact does not render *Byers* irrelevant. Although the subject matter of *Terry* stops is essentially criminal, there is nothing inherently incriminating about identifying oneself to an officer.

Identity is neutral information that does not incriminate the declarant in the context of a *Terry* stop. A *Terry* stop is based upon reasonable suspicion that "criminal activity may be afoot." *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968), a standard lower than probable cause to arrest, and far less than the necessary proof to prosecute and convict. See *Illinois* v. *Wardlow*, 528 U. S. 119, 123 (2000). Identification at this preliminary stage of an investigation is far removed from the highly incriminating information that the Fifth Amendment protects from compulsion. Indeed, in some cases providing identification will exonerate the suspect and quickly terminate the *Terry* stop. See *infra*, at 26. In addition to the effective confession struck down in *Albertson*, this Court has applied the Fifth Amendment to federal wagering tax statutes, see *Marchetti* v. *United States*, 390 U. S. 39, 41-42 (1968), and a federal firearms registration requirement, see *Haynes* v. *United States*, 390 U. S. 85, 86-87 (1968). Like *Albertson*, the statutes in *Marchetti* and *Haynes*

posed a much higher risk of self-incrimination than found in this case.

The wagering tax in *Marchetti* required those accepting wagers to pay an excise tax and register their occupation, names, and addresses with the federal government. See 390 U. S., at 42-43. Given the pervasive illegality of this occupation, see *id.*, at 44, registration placed the declarant at a substantial risk of prosecution and conviction. "Unlike the income tax return in question in [*Sullivan*], every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner . . . ." *Id.*, at 48-49. The firearm registration in *Haynes* was no different. Those it primarily applied to would also be in violation of other federal firearm statutes. See *Haynes*, 390 U. S., at 96. Registering would notify the government of this and put the declarant at a considerably higher risk of prosecution. See *id.*, at 97. "[T]he correlation between obligations to register and violations can only be regarded as exceedingly high . . . ." *Ibid.*

The correlation between identification and prosecution is significantly lower in the context of *Terry* stops. *Terry* exists at the lowest end of the culpability spectrum. Probable cause is itself far removed from proof of guilt. Therefore, the fact that an arrestee is later proven innocent does not necessarily contradict the initial probable cause finding. See *Hill* v. *California*, 401 U. S. 797, 804 (1971). Since reasonable suspicion is an even lower standard, see *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989), it follows that many people subject to *Terry* stops will never be prosecuted. While providing identification may aid the detaining officer's investigation of the suspect, it does not associate the suspect with conduct that is itself criminal, and proves no element of any crime. Lacking this substantial risk of incrimination, the Fifth Amendment privilege is inapplicable.

Justice Harlan's concurrence in *Byers* is consistent with the plurality opinion on this point. While the plurality readily distinguished the *Marchetti* line of cases, see 402 U. S., at 430, Justice Harlan would instead limit this line of cases "[t]o the extent that [it] appears to suggest that the presence of perceivable risks of incrimination in and of itself justifies imposition of a use restriction on the information gained by the Government through compelled self-reporting . . . ." *Id.*, at 452-453 (Harlan, J., concurring). This appears to be the main difference between the two opinions. There was no fundamental disagreement with the plurality on why the California statute satisfied the Fifth Amendment, and Justice Harlan's opinion is consistent with upholding the statute in this case. The schemes struck down in *Marchetti* and other cases "focused almost exclusively on conduct which was criminal." *Id.*, at 454. Being the subject of a *Terry* stop is not itself a crime, and providing identification does not tie the suspect to criminal conduct. Compliance with the schemes like the one in *Marchetti* reduced the accusatory system to a ritual for affirming guilt "secured through the exercise of the taxing power." *Id.*, at 456. The noncriminal nature of California's reporting scheme and the need for getting the information meant that there was no need to provide a use immunity for the information under the Fifth Amendment privilege. See *id.*, at 458. The California scheme did not turn a criminal trial into a "merely ritualistic confirmation of the 'conviction' secured through compliance with the reporting requirement," *ibid.*, and neither does NRS 171.123. The Nevada statute is therefore consistent with the Fifth Amendment analysis approved by a majority of this Court in *Byers*.

Petitioner's support for his Fifth Amendment case is little more than exaggerated dicta. He properly notes that the Fifth Amendment privilege applies to *Terry* stops. See Pet. Brief 19. This is basic Fifth Amendment law, as the government cannot compel self-incriminating testimonial disclosures regardless of the context of the questioning. See *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973). Petitioner begs the important question,

which is whether the compelled information is both sufficiently incriminatory and testimonial to be protected by the privilege.

The statements from this Court's opinions cited by the petitioner, see Pet. Brief 13-14, do not support invalidating NRS 171.123. It is true that this Court said about questioning at a *Terry* stop: "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984) (footnotes omitted). *Berkemer* addressed whether *Miranda* v. *Arizona*, 384 U. S. 436 (1966) applied to custodial interrogation of a suspect accused of a misdemeanor traffic offense, and whether "roadside questioning pursuant to a traffic stop constitutes custodial interrogation for the purposes of the doctrine enunciated in *Miranda*?" 468 U. S., at 422-423. The passage from *Berkemer* is merely dicta, which petitioner implicitly recognizes when he admits that the Fifth Amendment issue is still undecided. See Pet. Brief 12.

The *Berkemer* majority found a traffic stop more analogous to a *Terry* stop than a formal arrest. See 468 U. S., at 439. An officer can certainly demand identification from a stopped motorist and arrest a driver who does not produce identification for driving without a license. See *New York* v. *Class*, 475 U. S. 106, 120 (1986) (Powell, J., concurring); *Gustafson* v. *Florida*, 414 U. S. 260, 261-262 (1973). While neither *Gustafson* nor the *Class* concurrence address Fifth Amendment issues, this is understandable since it is a given that an officer can demand identification from a driver stopped at a traffic stop supported by reasonable suspicion. See *Delaware* v. *Prouse*, 440 U. S. 648, 676 (1979). The special need for identification with respect to drivers and automobiles precludes *Prouse* from being dispositive on the Fourth Amendment outside its automobile context. However, its Fifth Amendment relevance is undiminished since there is no automotive exception to the Fifth Amendment. Cf. *Berkemer*, 468 U. S., at 441 (*Miranda* can

apply to a traffic stop if the facts show custody). If a demand for identification violates the Fifth Amendment at a *Terry* stop on the street, then it does so in other contexts like automotive stops or post-arrest bookings. Since extending the self-incrimination privilege to those situations is unthinkable, it is equally inapplicable to requests for identification at *Terry* stops.

Most of the other statements quoted by the petitioner are concurrences or dissents, which lack precedential value. See Pet. Brief 13-14 (citing *Terry*, 392 U. S., at 34 (White, J., concurring); *id.*, at 33 (Harlan, J., concurring); *Michigan* v. *DeFillipo*, 443 U. S. 31, 44 (1979) (Brennan, J., dissenting)). Petitioner attempts to reinforce this meager authority with a quote from one other majority opinion, *Davis* v. *Mississippi*, 394 U. S. 721 (1969).

> "The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime . . . . *But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer to voluntary questions concerning unsolved crimes they have no right to compel them to answer.*" Pet. Brief 13 (quoting *Davis*, 394 U. S., at 727, n. 6) (emphasis added by Petitioner).

This begs the Fifth Amendment question. *Byers* and *Sullivan* both demonstrate that the government can compel individuals to provide identifying information so long as it is not both incriminating and testimonial. The Fifth Amendment is not a general right to refuse to answer questions, as anyone who has filled out an income tax form or testified at trial can confirm. While identification is incriminating and testimonial in some contexts, like a gambling registry, *Terry* stops do not present the risk of incriminating testimony to invoke the privilege.

II. The demands of modern society minimize the privacy interest in basic identifying information.

The Petitioner also turns to the Fourth Amendment for relief. See Pet. Brief 26-43. This argument is no better than his Fifth Amendment claims. The minimal intrusiveness of NRS 171.123 upon any reasonable expectation of privacy, when balanced against the substantial government need served by the statute, protects the identification requirement from Fourth Amendment attack.

A key to understanding why Nevada's identification requirement does not violate the Fourth Amendment is the very public nature of our identities. The main case addressing the relationship between identity and the Fifth Amendment noted that modern society required its members to provide identification in many situations. See *California* v. *Byers*, 402 U. S. 424, 427-428 (1971) (plurality opinion). Although made in the context of a Fifth Amendment decision, this point is equally relevant to Fourth Amendment claims. The Fourth Amendment only protects reasonable expectations of privacy. See *California* v. *Greenwood*, 486 U. S. 35, 39 (1988). While the person asserting a Fourth Amendment claim must have a subjective expectation of privacy, the Constitution only protects those expectations which society deems reasonable. See *id.*, at 39-40. Determining whether the subjective expectation is objectively reasonable requires a balancing of interests. See *Hudson* v. *Palmer*, 468 U. S. 517, 527 (1984). The interests balanced are those of society against the individual's desire for privacy. See *ibid.* (balancing society's interests in prison security against the prisoner's privacy interest in his cell). "'[I]llegitimate'" expectations of privacy are not protected by the Fourth Amendment. See *New Jersey* v. *T. L. O.*, 469 U. S. 325, 338 (1985).

Before the interests can be balanced, it is important to examine what Hiibel wants to keep private. The Nevada statute creates two potential privacy invasions, extending the detention so that the individual may produce identification, and requiring the detainee to expose his or her identity to the officer. Neither

invasion involves more than a minor intrusion upon individual privacy.

Public exposure substantially limits any reasonable expectations of privacy. In one famous example, there is no reasonable expectation of privacy in garbage that has been left on the curb, as that act exposes it to the public. See *Greenwood*, 486 U. S., at 40-41. It is unreasonable to expect police "to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *Id.*, at 41. "Hence, '[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection.'" *Ibid.* (quoting *Katz* v. *United States*, 389 U. S. 347, 351 (1967)).

Although it has important privacy aspects, identity is essentially public. As the *Byers* plurality noted, it is almost impossible to function in modern society without providing identification to many government agencies and public operations. See *supra*, at 7. Those who do not identify themselves operate at the margins of society, or are breaking the law by illegally entering the country.

Even though there is no national identification card, citizens, tourists, and resident aliens carry numerous forms of identification with them. Driver's licenses, social security cards, and credit cards are commonly carried by individuals. See Comment, Conceptualizing National Identification: Informational Privacy Rights Protected, 19 John Marshall L. Rev. 1007, 1009 (1986) (Conceptualizing National Identification). "On a *de facto* basis, the United States already has a national ID system. It includes a birth certificate, driver's license, and many job related documents in addition to the social security card." J. Eaton, Card-Carrying Americans 2 (1986). We carry such information not simply out of some obligation imposed by a bureaucratic society, but because ready identification benefits both individuals and society.

"The government holds vast amounts of personal information about individuals in the form of computerized records. The government has collected personal information for one basic reason: citizens in the United States are dependent on the government for a variety of goods, services, benefits and obligations. Such dependency necessitates the collection of information because administrative actions must precede each benefit received or obligation incurred." Conceptualizing National Identification, 19 John Marshall L. Rev., at 1010 (footnotes omitted); see also Linowes, Must Personal Privacy Die in the Computer Age, 65 A. B. A. J. 1180, 1182 (Aug. 1979) ("Administrators responsible for furnishing these services must satisfy themselves of a person's eligibility by demanding and getting personal, often sensitive, information").

Providing identification is also necessary for private transactions like obtaining credit. See LoPucki, Did Privacy Cause Identity Theft? 54 Hastings L. J. 1277, 1280 (2003). The credit reporting system requires that thousands of people know intimate identifying information about an individual. See *id.*, at 1280-1281. It is next to impossible for any of us to be truly anonymous.

The Fourth Amendment is not violated by compelling production of "physical characteristics" which are "constantly exposed to the public." *United States* v. *Dionisio*, 410 U. S. 1, 14 (1973). Since everyone speaks and writes except for the "'rare recluse,'" there is no reasonable expectation of privacy in a voice or handwriting sample. See *ibid.* Although the "'content of a communication is entitled to Fourth Amendment protection . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear.'" *Ibid.* Obtaining these identifying characteristics does not invade one's privacy. See *id.*, at 15. Fingerprinting is similarly unintrusive with respect to the Fourth Amendment, since it "'involves none of the probing into an individual's private life and thoughts that

marks an interrogation or search.'" *Ibid.* (quoting *Davis* v. *Mississippi*, 394 U. S. 721, 727 (1969)). The constitutional problem in *Davis* was not the fingerprinting, but the suspicionless "initial dragnet detentions" that led to the fingerprinting. See *ibid.*

These cases demonstrate that the compelled disclosure of public identifying characteristics lacks the necessary invasion of privacy to invoke the Fourth Amendment. The compelled identification in this case is no different. Except for fugitives from justice or the odd loner, our identities are as public as handwriting or the sound of one's voice. In some ways, identity is even more public than those two examples, since it is not necessary to use an expert witness to determine identity from a driver's license or similar form of identification. Since we constantly expose who we are to the public and the government, we have no reasonable expectation of privacy in identifying ourselves to officers after a valid *Terry* stop.

The State of Nevada knew who Hiibel was before Officer Dove asked him for identification. As a driver,[2] Hiibel was subject to the licensing and vehicle registration system necessary for highway safety. See *Delaware* v. *Prouse*, 440 U. S. 648, 658 (1979). While Officer Dove did not know Hiibel's identity at their encounter, Hiibel was far from anonymous. His desire not to identify himself did not protect any legitimate privacy interest.

Identifying information can cause considerable harm to an individual if it falls into the wrong hands. Identity theft is a growing problem, see LoPucki, Human Identification Theory and the Identity Theft Problem, 80 Tex. L. Rev. 89, 89-90 (2002), that causes considerable financial damage and personal inconvenience to those whose identities are "stolen." See *id.*,

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2. Hiibel was found just outside a truck in which his minor daughter was seated. See *supra*, at 2. Although there is no finding on this point in the record, it is logical to conclude that he was driving just before the encounter with Deputy Dove.

at 94-95. This very real privacy interest is not implicated by NRS 171.123. Barring a separate fraudulent act by police officials, demanding identification at a *Terry* stop will not aid identity theft.

Since the Fourth Amendment is both more and less than a general constitutional right to privacy, see *Katz* v. *United States*, 389 U. S. 347, 350-351 (1967), this privacy issue is not dispositive. But in the balancing of interests that determines Fourth Amendment reasonableness, the lack of privacy in one's identification is telling. Since Hiibel had no expectation of privacy in his identity, its exposure to Officer Dove does not implicate the Fourth Amendment. While requiring him to produce identifying information implicates Fourth Amendment interests, see Part III, *infra*, our inability to be anonymous minimizes the intrusiveness of NRS 171.123.

III. Requiring *Terry* detainees to provide identification is minimally intrusive and does not threaten individuals with arbitrary arrests.

While there is no Fourth Amendment interest in keeping one's identity private from the government, see Part II, *supra*, the act of compelling its production raises other Fourth Amendment issues. Compelling production of an individual's identity is a seizure that is separate from the privacy interest in identity. It is also claimed that stop and identify statutes threaten individuals with arbitrary arrests. NRS 171.123's seizure is minimal, and does not subvert probable cause through arbitrary arrests.

A. Minimal Intrusion.

A seizure occurs when "by means of physical force or a show of authority [an individual's] freedom of movement is restrained." *United States* v. *Mendenhall*, 446 U. S. 544, 553 (1980). The initial *Terry* detention that is a prerequisite for applying NRS 171.123 is a seizure, see *Terry* v. *Ohio*, 392 U. S.

1, 16 (1968), and conditioning its termination upon producing identification necessarily involves a seizure. Detaining someone for the purpose of providing identification is a seizure, see *Brown* v. *Texas*, 443 U. S. 47, 50 (1979) and must be supported by some reasonable suspicion. See *id.*, at 51-52.

In *Brown*, two officers in a patrol car observed two individuals walking in an alley one afternoon in El Paso, Texas. See *id.*, at 48. Brown was stopped by the officers and "asked . . . to identify himself and explain what he was doing there." *Id.*, at 48-49. An officer testified that Brown was stopped because he " 'looked suspicious and we had never seen that subject in that area before.' " *Id.*, at 49. The stop took place in an area with a high level of drug traffic, but Brown was not suspected of any "specific misconduct." *Ibid.* Brown repeatedly refused to identify himself, and was arrested for and convicted of violating a Texas stop-and-identify statute. See *ibid.* This Court held that detention for the purpose of identification is a seizure that must be reasonable under the Fourth Amendment. See *id.*, at 50. Since the stop was not supported by reasonable suspicion, see *id.*, at 51-52, the detention was unreasonable, and therefore the statute could not apply to Brown without violating the Fourth Amendment. See *id.*, at 53. The Court explicitly refrained from deciding the question in the present case. *Id.*, at 53, n. 3.

Brown does not control this case because Hiibel's stop was supported by reasonable suspicion. See *supra*, at 5. In the context of a *Terry* stop, the seizure in this case is minimal. Since it is almost impossible to function in modern society without providing identifying information to the government, see *supra*, at 15-17, individuals out in public will almost always carry some form of identification with them. Since Hiibel had been driving a truck, he was required by law to carry a driver's

license. See NRS 483.350.[3] In this, as in almost every case, Hiibel could have complied with the request had he chosen to. The information he would have given the officer was not private. See Part II, *supra*. The act necessary to comply with a request for identification is typically minor and routine, reaching into one's pocket or purse and producing an identifying card such as a driver's license. Since identifying oneself to third parties is common, easy, and minimally intrusive, Deputy Dove's request did not burden Hiibel to any constitutionally significant degree.[4]

Terry reflects the Fourth Amendment's pragmatism. Situations that warrant some investigation and pose a limited threat to officer safety can support intrusions that fall short of a general search or an arrest. See *Terry*, 392 U. S., at 30-31. *Terry* is based on the principle that the Fourth Amendment is not "a rigid all-or-nothing model of justification and regulation," see *id.*, at 17, but rather a careful balancing of interests. See *id.*, at 21. Whether an intrusion is legal under *Terry* is first judged by whether the intrusion serves these interests.

The purpose of a *Terry* stop is crime detection and prevention, see *id.*, at 22, which requires a flexible approach to its limits. For example, there is no bright-line rule governing the length of a permissible detention under *Terry*. Even though it was first contemplated that *Terry* stops would be brief, see *Adams* v. *Williams*, 407 U. S. 143, 146 (1972), experience showed that it was necessary to expand the permissible length of the stop when more time was needed to investigate the suspicious activity. See *Michigan* v. *Summers*, 452 U. S. 692,

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3. An individual arrested for violating this statute has a complete defense to the charge if he or she provides the Court with a valid driver's license at trial. See NRS 483.350.

4. The fact that Hiibel was identified after his arrest, see J. A. 2, indicates that he could have produced identification to comply with Deputy Dove's request.

700-701, n. 12 (1981). *Terry* can expand to accommodate reasonable public safety needs.

Determining the suspicious person's identity is part of any legitimate *Terry* investigation. See *Adams*, 407 U. S., at 146, See Part IV, *infra*. The ability to identify the suspect is particularly important because *Terry* is not limited to investigating potential crimes. *Terry* stops are also allowed to investigate a completed felony. See *United States* v. *Hensley*, 469 U. S. 221, 229 (1985). Obtaining identification of an individual suspected of having committed a crime is essential to the *Terry* stop and investigation. "[W]here police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, *or check identification* in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice." *Ibid.* (emphasis added).

Since complying with this part of the investigation is usually easy, involves minimal physical effort, and does not expose private information, compelling identification is comparatively unintrusive in the context of *Terry*. As the next section demonstrates, the real objections to stop and identify statutes are aimed at the substance of the statutes rather than any legitimate Fourth Amendment interests.

B. Compulsion and Terry.

Rather than focusing exclusively on traditional Fourth Amendment concepts such as privacy, opponents of stop and identify statutes also assert that these laws place too much power in the hands of the police. In essence, the claim is that it allows an officer to circumvent the probable cause standard by transforming a *Terry* stop into a custodial arrest. See Pet. Brief 26-33; *Kolender* v. *Lawson*, 461 U. S. 352, 365-367 (1983) (Brennan., J., concurring). Since both *Terry* and the probable cause standard protect individuals from arbitrary arrests, this concern is unfounded.

The Fourth Amendment requires that most searches and seizures be justified by some form of objective suspicion to limit the discretion of government officials and prevent the arbitrary invasion of privacy by the government. A primary consideration in the balancing of interests underlying the Fourth Amendment reasonableness test, "has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown* v. *Texas*, 443 U. S. 46, 51 (1979). The need to control police discretion is why the state cannot compel an individual to provide identification to an officer at a stop that was not justified by reasonable suspicion. See *id.*, at 52.

This problem is absent in this case, since the initial stop was supported by reasonable suspicion. While any level of objective suspicion will tend to limit officer discretion, the level of suspicion needed to justify the intrusion also limits unnecessary intrusions upon privacy. Greater intrusions require more justification through a higher level of suspicion, while lesser intrusions need less suspicion. Therefore, while the more limited *Terry* stop only requires reasonable suspicion, see *Illinois* v. *Wardlow*, 528 U. S. 119, 123 (2000); an arrest requires probable cause. See U. S. Const., Amend IV; *Atwater* v. *City of Lago Vista*, 532 U. S. 318, 354 (2001). The level of suspicion is like the price paid by the government in order to comply with the Fourth Amendment.

Nevada paid the proper price in this case. The initial stop was a *Terry* stop, and was amply justified under the reasonable suspicion standard. Given the minimal intrusion of the demand for identification and the ease of complying with the demand, the substantial government interest in obtaining identification to aid investigation justifies this intrusion under the Fourth Amendment reasonableness standard. See Part IV, *infra*. Hiibel's arrest was based on probable cause. The statute required that he provide identification; failure to do so was a crime. Refusing eleven separate requests to comply with this duty to identify, see *supra*, at 2, gave Deputy Dove probable

cause to believe that Hiibel had committed the crime of resisting a public officer. See NRS 199.280.

This does not convert every *Terry* stop into a potential arrest at the officer's unfettered discretion. An identification requirement is relatively easy for most people to satisfy, since most of us carry some form of identification. Any identification statute must also provide a sufficiently precise standard for complying with its requirements to avoid the void for vagueness doctrine, see *Kolender*, 461 U. S., at 358,[5] which itself limits the officer's discretion. Arrest is possible only if the stopped individual provides the officer with probable cause to believe that the suspect has failed to comply with an appropriately narrow identification requirement.[6] The facts of this case show no abuse of discretion, as Hiibel's foolish belligerence effectively invited an arrest. See *supra*, at 2.

Petitioner's claims on this point do no more than reflect dissatisfaction with *Terry* and most Fourth Amendment precedents. He asserts that *Terry*'s flexible standard will not protect individuals from arrest at the officer's discretion. " 'Suspicion involves so low a degree of belief and so subjective a judgment that it is impossible . . . to draw a line between "mere" suspicion and a "reasonable" suspicion.' " Pet. Brief 11 (quoting Schwartz, Stop and Frisk (A Case Study in Judicial Control of the Police), 58 J. Crim. L. Criminology & Police Sci. 433, 445 (1967)). He also notes that this Court has stated that " 'the concept of reasonable suspicion is somewhat abstract,' and that 'the cause "sufficient to authorize police to stop a person" is an "elusive concept." ' " *Id.*, at 10 (quoting *United*

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5. Petitioner has not raised a vagueness challenge to NRS 171.123, see *supra*, at 5-7.

6. The statutory language does not require written proof of identification. See NRS 171.123(3) ("shall identify himself"). Since Hiibel refused to identify himself, the issue of whether an identification requirement can only be satisfied by some written proof like a driver's license is not raised in this case.

States v. *Cortez*, 449 U. S. 411, 417 (1981)). *Terry* thus leaves officers "to rely on their own subjective judgment" when deciding who to stop. *Ibid.* Because *Terry* has not been reduced to a series of bright-line rules, the argument goes, the law on when an officer can stop is muddied. See *id.*, at 11. "In essence, police officers proceed with neither guidance nor limitations in assessing what behavior qualifies as suspicious." *Ibid.*

This attacks *Terry* rather than Nevada's stop and identify statute. Bright-line rules are not necessary for an objective standard. "The concept of reasonable suspicion, like probable cause is not 'readily, or even usefully reduced to a neat set of legal rules.' " *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983)). Probable cause and reasonable suspicion are also similarly impossible to define precisely. See *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996). This is not some recent innovation, designed to allow police to run wild in the streets. Instead, it recognizes that review of the endless variety of encounters governed by the Fourth Amendment must be flexible. See *Ker* v. *California*, 374 U. S. 23, 33 (1963) (Fourth Amendment standards are not "susceptible of Procrustean application"). The abstract, flexible probable cause standard is still objective, see *Prouse*, 440 U. S., at 654, and so is reasonable suspicion. See *ibid.*, and n. 9. The claim that NRS 171.123 does not restrain officers is inconsistent with *Terry* and the flexible approach that is the cornerstone of this Court's Fourth Amendment jurisprudence.

This argument for a right to anonymity then falls into hyperbole.

> "Thus, under the current state of the law in Nevada, a person can be stopped by the police for engaging in perfectly innocent yet 'suspicious' behavior, asked to identify himself, and if he declines, be arrested and hauled off to jail. This is frighteningly reminiscent of Nazi Germany, where people lived in fear of being approached by the Gestapo and commanded to turn over 'Your papers, please.' " Pet. Brief 11.

This self-refuting statement needs little more analysis. However, it is worth noting that if a state-issued identification card is the defining characteristic of the Third Reich, then many liberal democracies share this characteristic. See J. Eaton, Card-Carrying Americans 121-123 (1986). In any event, *Brown* and *Kolender* insure that NRS 171.123 or similar laws never become random checks for papers. *Terry* prevents random stops, and a validly stopped person cannot be arrested unless there is probable cause that he or she did not comply with a proper identification statute. The Fourth Amendment requires no more.

IV. It is reasonable under the Fourth Amendment to require someone who has been validly stopped under *Terry* v. *Ohio* to provide identification to the officer.

Determining whether the government intrusion is reasonable is the cornerstone of Fourth Amendment analysis. See *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108-109 (1977) (*per curiam*). History is frequently crucial to this analysis. In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was fra[illegible]" *Wyoming* v. *Houghton*, 526 U. S. 295, 299 (1999). History does not help in the present case. While there is some evidence of common law precedent supporting the limited seizure of *Terry* v. *Ohio*, 392 U. S. 1 (1968), see *Minnesota* v. *Dickerson*, 508 U. S. 366, 380 (1993) (Scalia, J., concurring), the pervasive use of identification that is a hallmark of our modern technological society, see *California* v. *Byers*, 402 U. S. 424, 427-428 (1971) (plurality), and did not exist at the common law. Where history is muddled or inapplicable, it is necessary to "evaluate the search or seizure under traditional standards of reasonableness by assessing, on

the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests." *Houghton*, *supra*, at 300. An identification requirement for *Terry* detainees readily satisfies this balancing test.

The minimal intrusiveness of this requirement has already been explained. One's identity is not private, particularly with respect to the government. See Part II, *supra*. The act of producing identifying information involves little real intrusion and does not subject individuals to the risk of arbitrary arrest. See Part III, *supra*. Producing identification is a routine, or even daily event for most people and does little to intrude upon reasonable expectations of privacy.

Society has a substantial interest in identifying *Terry* detainees at the time of the detention. *Terry* stops are a legitimate part of the essential government interest in crime investigation and prevention. See *Terry*, 392 U. S., at 22. Society's interest in identification does not have to differ from this general interest. Instead the question is whether this application of the interest in crime control and detection is sufficiently "'substantial.'" See *United States* v. *Place*, 462 U. S. 696, 704 (1983). An identification requirement enhances the utility of *Terry* stops at little cost to privacy.

The petitioner correctly notes that police on patrol have access to comprehensive computer databases of offenders. See Pet. Brief 24, n. 9. This makes the suspect's identity particularly important for a fast and efficient investigation. Since Hiibel apparently has no prior criminal record, providing his identity would not have solved or prevented a crime in this case. However, if he had a prior record of convictions for sexual crimes or domestic battery, or had an outstanding warrant for kidnapping, then NRS 171.123 could help to solve or prevent a serious crime. Officer Dove had more than reasonable suspicion that a crime of domestic violence was in progress. Checking the detainee's identity against a database of persons subject to domestic violence restraining orders

would be an entirely prudent, proper step for the protection of victims in this situation.

Identification can also help release a suspect more quickly than in an anonymous encounter. If the police are looking for a specific suspect, then providing identification can help absolve the innocent suspect more quickly. This also applies if the police are looking for a particular type of person, such as a professional burglar. If officers are investigating a burglary committed by someone with skill at entering and leaving a dwelling undetected, then an identification check that shows no prior convictions for burglary or lesser included offenses could lead to an early release of the suspect. While innocent suspects should be willing to provide identification out of simple self-interest, Hiibel's foolish belligerence shows that this will not always be the case. Giving officers the authority to arrest those who impede their investigation in this way helps to insure that most suspects will identify themselves. See Note, Stop-and-Identify Statutes After *Kolender* v. *Lawson*: Exploring the Fourth and Fifth Amendment Issues, 69 Iowa L. Rev. 1057, 1074-1075 (1984). Identifying an unwilling innocent suspect allows police to move scarce investigative resources to other leads. When Hiibel refused to identify himself he did not just harm himself, he also harmed society by wasting precious police personnel. Nevada was well within its rights to punish him for impeding the police in this matter.

Identification is also useful in more ambiguous cases. When the police have not clearly absolved the suspect, obtaining identification lessens the cost of release, since it gives officers a chance to initiate contact again if more investigation is warranted. See *id.*, at 1074. If a *Terry* detainee does not provide identifying information, then the officer's options are to continue the detention to further investigate the suspect. While *Terry* stops can be extended to accommodate investigative needs, see *United States* v. *Sharpe*, 470 U. S. 675, 686-687 (1985), there is a limit to how long the suspect can be detained.

At that point, the officer will either release and lose the suspect, or make an arrest that may not be supported by probable cause.

Finding out a suspect's identity is important to effective police work and a key component of *Terry*. Determining the suspect's identity is the beginning of any good investigation and is therefore integral to *Terry*. "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be the most reasonable in light of the facts known to the officer at the time." *Adams* v. *Williams*, 407 U. S. 143, 146 (1972). If NRS 171.123 is an extension of *Terry*'s authority, it is a reasonable one in light of its minimal extra intrusion on privacy.

Allowing officers in the field to require *Terry* detainees to identify themselves substantially helps the officer find the guilty and send the innocents on their way. It allows ambiguous investigations to be continued at a later date so that police may continue the investigation without prematurely arresting the suspect. This is an excellent bargain for society and individual rights and is thus reasonable under the Fourth Amendment balance of interests.

CONCLUSION

The decision of the Nevada Supreme Court should be affirmed.

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Respectfully submitted,

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